No. 615

In the Supreme Court of the United States

ohn A. Grogan, Collector of Internal Revenue, and
ichard I. Lawson, U. S. Collector of Customs,
Defendants and Appellants,
v.
iram Walker & Sons, Limited,
Plaintiff and Appellee.

October Term, 1921.

BRIEF FOR APPELLEE.

Alfred Lucking,
Counsel for Appellee.

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CASES CITED.

STATUTES, ETC., CITED.

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BRIEF FOR APPELLEE.

The Question:

May the practice, which has hitherto prevailed, of "shipping in bond" of liquors *through* the United States—that is from one foreign country through the United States to another foreign country—be continued lawfully under the "National Prohibition Act," or is the same prohibited under the true interpretation of its terms? This practice has prevailed, under the treaty and the statute, for something like fifty years, and it continued during the period of war-time prohibition without abuse, and it has continued since the National Prohibition Act took effect down to the present time, without abuse.

THE CASE WAS HEARD BELOW, somewhat informally, upon the bill and motion to dismiss, and answer subsequently (but before decree) filed.

The court decreed that "the allegations of material facts contained in the bill of complaint are true" (Rec., p. 26).

To this, no assignment of errors was made (Rec., p. 28); and we proceed to state the substance of the bill.

Compendium of Bill of Complaint.

(1) Plaintiff is a corporation of Ontario, Canada.

(2) Defendant, Lawson, is United States Collector of Customs at Detroit, and defendant, Grogan, is United States Collector of Internal Revenue.

(3) Plaintiff, being a distiller, has for more than thirty years sold its liquors in all parts of the World and has shipped its product from Walkerville, Ontario (opposite Detroit) through the United States to foreign countries sending the same through the United States in bond under provisions of the United States Statutes and the Treaty of 1871 between the United States and Great Britain.

(4)
(5)
(6)
(7)

These paragraphs quote sections of the Statutes and the Treaty bearing on the question. They are hereinafter quoted.

(8) Since the Constitutional Amendment and National Prohibition Act, plaintiff has imported nothing into the United States but has continued shipping to foreign countries *through* the United States by way of the ports of New York, and New Orleans and others. Plaintiff now has bona fide orders for more than forty thousand cases, of the value of more than $300,000.00, from residents and dealers

South America, Central America, Europe, Asia and Africa and intends to continue to ship through the United States, if permitted to do so. That such shipments have been without abuse in the past and that the loss from such shipments in the past has been negligible, giving details.

(9) (10) (11) (12) These paragraphs set forth the seizure by the defendants of a certain shipment to a customer in Mexico, and threatened seizures of all such proposed shipments and refusal to accept further shipments for transportation in bond.

(13) The Federal Prohibition Director refuses to grant any permits to trans-ship in bond from one foreign country to another.

(14) Plaintiff tendered a shipment of 600 cases in accordance with the Statutes and Regulations for Trans-shipment in Bond, to defendant, Lawson, destined to Guatamala in due course of business, but defendant, Lawson, refused to permit the same and threatened to seize and forfeit it unless a permit was obtained from the Federal Prohibition Director; and the Federal Prohibition Director thereupon refused such permit.

(15) That plaintiff is in fear of criminal prosecutions under the National Prohibition Act, as well as proceedings to forfeit the goods if it attempts any further such shipments.

(16) Plaintiff is advised that under the Legislation of the United States and the Treaty aforesaid, it is entitled to continue such practice.

(17) That said practice continued after the 18th Amendment and the Volstead Act went into operation on the 16th of January, 1920, down to the present time, without intermission or interference until the seizures before mentioned, and that the privilege had never been abused or used as a cover for smuggling into the United States; but on the contrary Mr. George W. Ashworth, Chief of the Customs

Division of the Treasury Department having charge of these matters for the Treasury for years past, expressly declared to the Attorney-General that there had never been any complaint of any such violations and none such had occurred so far as known. Further, that no claim had ever been made by the Prohibition Enforcement Officers of any such violations or that the further exercise of the privilege would result in introducing liquors into the United States in violation of the 18th Amendment. That just before the Amendment to the Volstead Act became effective this question was given due consideration "by the Legal Departments of four different branches of the Government namely, the attorneys for the Prohibition Unit of the Internal Revenue Department of the Treasury; the attorneys for the Customs Division of the Treasury; the Counsel for the United States Railroad Administration (the railroads then being operated by the Government); and finally the General Solicitor for the Treasury Department, Judge Becker, all of whom rendered their opinions that the practice was not in violation of either the 18th Amendment or the Volstead Act."

(18) That defendant, Lawson, unless restrained will dispose of the shipment heretofore seized and plaintiff will be deprived of its property without due process of law. That the Acts and doings of the defendants committed, threatened and apprehended as set forth are in violation of the Statutes and Constitution of the United States and in violation of the Treaty above mentioned.

(19) That if deprived of the privelege aforesaid, a large part of the valuable business of the plaintiff will be destroyed and the damage will be irreparable.

(20) The amount involved exceeds $3,000.00 exclusive of interest and costs. Details of its business, amounts, etc., in foreign countries, given herein. That it will be necessary to incur much greater expense, and great delay to ship first to Europe and then to these foreign countries.

(21) Prayer for relief. That defendants be restrained from the conduct aforesaid; be compelled to return the shipment seized; that the defendants be restrained from enforcing upon the plaintiff or its goods any of the pains, penalties or forfeitures under the National Prohibition Act when being offered for trans-shipment in bond, and that defendant be enjoined from arresting or prosecuting the plaintiff or its officers or agents for such acts, etc.; and that defendants and other officials of the Treasury be permanently enjoined from interfering with trans-shipment in bond, etc.

The Defendants, In Answer to Order to Show Cause, Moved to Dismiss Bill of Complaint, Because:

There is no equity in the bill.

That the National Prohibition Act and Regulations thereunder forbid such trans-shipment of whisky.

That the treaty of 1871 is abrogated by the National Prohibition Act and the 18th Amendment.

A STIPULATION was made by counsel that "the whisky in controversy was and is intended for consumption as beverage whisky, but the plaintiff does not admit the materiality of the manner of the use thereof."

AN ANSWER was filed, after the oral argument, but before decree. It is printed in record, pages 16 to 18. It admits practically all of the allegations of the bill and takes issue almost wholly on questions of law. Not denying the allegations of the bill that there has been no abuse of the privilege in the past the answer prophesies about the future as follows (paragraph 21), if such shipments are made as prayed:

"That said cars may be entered by violators of the law and said whisky removed while in the United

States; that the cars in which whisky is shipped are not proof against thieves and that large quantities of merchandise are stolen from interstate shipments of all kinds of merchandise and that cars containing whisky may be easily entered by the breaking of the seals and the contents removed en route through the United States, except where detectives accompany said shipments, and even in such cases losses have been and will be sustained."

The Decision.

The Learned District Judge, in a most logical, illuminating and concise opinion (Rec., p. 20), covered each point raised and held that the Treaty and Statutory Provisions giving the privilege of trans-shipping in bond were not repealed by the 18th Amendment or the National Prohibition Act. He said:

> "What warrant, then, is there for ascribing to Congress a purpose * * * to prohibit the shipping of liquor not intended for, or capable of, use for beverage or any other purpose in the United States, and transported, not into, but through the United States (*United States v. Gudger, 249 U. S., 373, 63 L. Ed. 653; McLean v. Hager, 31 Fed., 602*), in accordance with a treaty then in existence and not expressly abrogated or otherwise mentioned in the statute which is claimed to have indicated such a purpose * * * I am of the opinion that the National Prohibition Act does not indicate any intention to forbid the conveyance of intoxicating liquors in transit in bond from Canada through the United States to foreign countries under the provisions of the Treaty and Statute authorizing such conveyance, and pursuant to proper rules and regulations by the executive officials having charge thereof."

Accordingly a decree was rendered granting the relief prayed (Rec., p. 26).

I.

The Constitutional Provision And Statutes to be Considered Are as Follows:

The Eighteenth Amendment to the Constitution, which has an important bearing on this question, reads as follows:

> "Sec. 1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

The statute authorizing such shipments in bond is Section 3690 of the United States Compiled Statutes of 1916 (adopted 1900), which is 3005 of the Revised Statutes. It reads as follows:

> "All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom house and *conveyed in transit through* the territory of the United States without the payment of duties under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

The new *"NATIONAL PROHIBITION ACT"* contains several sections to be considered.

Title II, Sec. 3, reads as follows:

> "Sec. 3. No person shall on or after the date the 18th amendment to the constitution of the United States goes into effect manufacture, sell, purchase, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this

act, and all the provisions of this act shall be liberally construed to the end that the *use* of intoxicating liquor as a beverage may be prevented."

Title II, Sec. 6:

"No one shall manufacture, sell, purchase, transport or prescribe without first obtaining a permit from the Commissioner so to do, except that a person may without a permit, purchase and use liquor for medicinal purposes." * * *

Title II, Sec. 35:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

Title III, Sec. 20:

"That it shall be unlawful to import, introduce, into the canal zone or to manufacture, sell, give away, dispose of, transport or have in ones possession or under ones control within the canal zone, any alcoholic * * * or spirituous liquors * * * providing that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

A section of the war time Prohibition Act reads as follows:

"After the approval of this act, no distilled malt vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war until the period of demobilization, provided that this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this act."

U. S. Comp. Stat., 1916, Supp. of 1919, Vol. I, page 796, Sec. 3115-11 12gg.

II.

The Treaty Provision.

Article XXIX of the Treaty between the United States and Great Britain, concluded at Washington, May 8, 1871, is important. That article so far as material, reads as follows:

> "It is agreed that for the term of years mentioned in Article XXXIII of this treaty goods, wares, or merchandise arriving at the ports of New York, Boston and Portland, and any other ports in the United States which have been or may from time to time be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in dise may be *conveyed in transit*, without the payment transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations and conditions goods, wares or merchanof duties, from such possessions through the territory of the United States for export from the said ports of the United States."

The Importance of the Treaty Provision may be stated as follows:

It is not contended by us that Congress, notwithstanding this treaty provision could not pass an act prohibiting the transportation through the country of certain specified British or Canadian goods, which Congress chose to designate as deleterious or injurious to the interests of people

of the United States, as for illustration, opium or poisons; but it is contended that when a practice has long existed under the treaty, of transporting goods which are recognized as legitimate subjects of commerce by England and her dominions (and which have hitherto always been recognized as legitimate subjects of interstate commerce by our Supreme Court, 223 U. S., 70, 82), and it is claimed that certain new legislation of Congress operates to prohibit such practice then such interpretation of the new legislation will prevail as will permit the continuation of the practice, *unless it is clear that it was the intent of Congress to prohibit it, and that the two cannot stand together.*

The Bill Alleges a Case Under the Treaty.

The Government brief (page 36) makes a point (one not made or claimed below) that our bill of complaint does not make proper allegations to bring the case within Article 2 of the Treaty. This point is made because the special particular shipment that was seized was going to Mexico and there is no allegation in the bill that the President of the United States, under Article 29 of the Treaty, has designated the particular port of exit as one of the ports to come under Section 29, which recites:

> "Ports of New York, Boston and Portland, and any other ports in the United States which have been or may from time to time be specially designated by the President of the United States."

It is true that there is no special allegation about the President having designated other ports, but the allegations of the bill are very broad, showing that plaintiff was engaged in shipping from the port of New York and other ports of the United States, under the treaty, and was constantly engaged in such shipments, and that the defendant's acts were depriving plaintiff of its rights under the treaty in that behalf. The allegations of the bill (which are found

by the court below to be true) on this subject, are contained in subdivisions of the bill numbered III (Rec., p. 2), VIII (Rec., pp. 3, 4), XII (Rec., p. 6), XVI (Rec., p. 7), XVII (Rec., p. 7), XVIII (Rec., p. 8).

It is unnecessary to quote them here It will be found upon examination that they are broad allegations alleging the facts covering the treaty rights and claiming such rights.

Such technical objection will not be entertained here, when not made or called to the attention of the court below.

San Juan Co. v. Requena, 224 U. S., 97.
Brown v. Gurney, 201 U. S., 190.
Grant Bros. v. United States, 232 U. S., 661.
Campbell v. United States, 224 U. S., 106.
Charlotte v. Atlantic Co., 228 Fed., 463.

THAT ART. 29 OF THE TREATY IS STILL IN FULL FORCE, SEE APPENDIX, PAGE 1.

III.

Some Facts About This Practice Are Important.

It has prevailed for a great many years without abuse.

It prevailed all during War Time Prohibition. It was the deliberate opinion of the legal officers of the Treasury that it was not within the prohibition of that statute, hence it continued during that period, without abuse.

Just before the National Prohibition Act went into effect this question was considered by the law officers of four different departments of the Government and it was the unanimous opinion of all those lawyers, about seven in number, that the new act did not prohibit this practice (Rec., p. 8). They were the law officers of the Prohibition Unit, the law officers of the Customs Division of the Treasury, the Counsel of the Railroad Administration of the Government (the railroads were then under Federal control), and finally the General Solicitor of the Treasury Judge Becker. All were of the opinion that the new act did not interfere with the "transit in bond" practice.

The practice continued under National Prohibition and has continued until the present time.

It so continued without abuse, that is without in any way being used as a cover for smuggling the goods into the United States. There has been no evil arising from it at any time, either before or during war time prohibition or under national prohibition, and no claim of such has at any time been made. And the Chief of the Division having charge for years past of such shipments so declared on the hearing to the Attorney-General (Rec., p. 8). There have been some thefts, as in other kinds of merchandise, but they have been negligible (Rec., p. 4).

No Danger of Violation of the Privilege.

All goods arriving for "transit in bond" are immediately declared and placed in charge of the Treasury Officials, and are conveyed across the country under such regulations to prevent their escape into the Country as the Treasury may choose to adopt. They may be as stringent as the Secretary cares to impose, and there is therefore not the slightest reason for giving this act an interpretation based upon the idea that the privilege may be used as a cover for smuggling. The Court, we submit, will act upon the opposite theory. Therefore, we have here a case which is not within the evil to be remedied by the Eighteenth Amendment and the Volstead Act. The allegations in the bill show that there had been no abuse of this practice and that there had been no complaint by the Prohibition Officials of any such violations or threatened violations (Rec., pp. 4, 8).

The language of Mr. Justice Holmes in the *Taylor case*, relating to the landing of aliens is pertinent. The language of the Statute forbade all "landing" except as designated by Immigration Officers, but this was held not to prohibit alien sailors from going ashore at other ports and places. The learned Justice said:

> "If we reject the ambiguous interpretation of 'to land' as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American Port with the bona fide intent to take them out again when the ship goes on, *when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert and get in, but there is no evidence that they were doing so in fact.*"
>
> *Taylor v. U. S., 207 U. S., page 125.*

So in *U. S. v. 85 Cattle*, where cattle, belonging to a resi-

dent of Canada, strayed over the National Boundary into the United States, the Court said:

> "True such straying (into the country) may afford opportunity to the owner to defraud the revenue in that he may, if the strays escape notice, secretly sell or merge them in property here—in effect 'import' them without paying duty. This danger, however, cannot affect the construction of the law. Vigilance or new legislation may guard against it."

U. S. v. 85 Cattle, 205 Fed., 681.

So is was pointed out by Mr. Justice Clarke, in the *Street case*, that the administrative power conferred upon the Treasury was sufficient to preclude liquors escaping into the body of the Country. He said:

> "Clearly there is like administrative power under the Act to so regulate the transfer of such stored liquors from the warehouse to the dwelling of the owner as to prevent their being used to evade the prohibitions of the Act or to substantially interfere with its effective enforcement."

Street v. Lincoln Co., 254 U. S., 93.

The Act provides for Treasury Regulations for the transporting of liquors within the United States, for medicinal purposes. There is no more reason for the escape of the liquors for general use in violation of the Act, in one case than in the other. The Court will act upon the distinct and clear assumption that in either case there will be no violation of the privilege.

IV.

Repeal of Statute By Implication:

It is clear from the statutes above quoted that there is no express repeal of Section 5690. The question arises whether there is a repeal by implication, so far as liquors are concerned.

Repeals By Implication Are Not Favored.

The inconsistency must be clear and explicit.

Ex parte Webb, 225 U. S., 683.
Washington v. Miller, 235 U. S., 428.
Ex parte U. S., 226 U. S., 420.
U. S. v. Lee, 185 U. S., 221, 222.

In Ex parte Webb, supra, the Supreme Court of the United States, speaking by Mr. Justice Pitney, states the rule as follows:

> "But it is a settled rule of statutory construction that repeals by implication are not favored and will not be held to exist if there be any other reasonable construction." Citing other cases, decided by the Supreme Court of the United States.

Note 1: We beg to say to this Court that no concession by counsel for appellee was made in the court below as to the construction of the Amendment or the Volstead Act different from our contentions made herein, as might be inferred from the statement of counsel in the Government brief at page 16. The same brief as this one in all substantial points was filed by us below, and our bill of complaint speaks for itself on this subject (Rec., pp. 4, 7, 8), and our oral arguments below were strictly in accord therewith.

Note 2: All italics ours, unless otherwise noted.

In Washington v. Miller, supra, the Supreme Court of the United States says:

> "In these circumstances we think there was no implied repeal and for these reasons; First, such repeals are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and later statute that effect can not be reasonably given to both (citing decisions); second, where there are two statutes upon the same subject, the earlier being special and the latter general, the presumption is in the absence of an express repeal or an absolute incompatibility that the special is intended to remain in force as an exception to the general (citing decisions): and third, there was in this instance no irreconcilable conflict or absolute incompatibility for both statutes could be given reasonable operation if the presumption just named were recognized."

In ex parte United States, supra, the court said:

> "When the use is thus narrowed, solution is readily reached by the application of the *elementary rule* that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law, unless the repeal be express or the implication to that end be irresistible."

In U. S. v. Lee, supra (page 221), the Court in discussing repeal by implication of one statute by another, says:

> "The rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that there must be *a positive repugnancy* between the provisions of the new laws and those of the old laws; and even then the old law is repealed by implication only *pro tanto* to the extent of repugnancy; and if harmony is impossible, and

only in that event, the former is repealed in part or in whole as the case may be."

The Supreme Court in the same case stated that the same rules apply where it is claimed that repeal by implication was by a treaty (page 222).

> "But the later statute does not in terms repeal the former, *and presumably both stand if there is anything for them to operate upon.* The later statute must be shown to be repugnant to the former to repeal it or any portion of it."
>
> *Marks v. U. S., 196 Fed., 478.*

In the case now under consideration there is no inconsistency between section 5690, permitting trans-shipments *through* the territory of the United States from one foreign country to another, and the new National Prohibition Act, which aims to prevent the manufacture and sale and in part the use of intoxicating beverages *within* the United States. Both may stand and be enforced.

War time prohibition was in force, but shipments in bond from one foreign country to another went on just the same. The latter practice did not interfere with the former, and the same condition has existed under the National Prohibition Act for more than two years.

This being unquestionably so, it would seem plain under the authorities that Section 5690 is not repealed as to liquors by the new act.

V.

Repeal of Treaty Rights:

The right of transit was conferred not only by th Treaty, but the privilege was extended also by the statute Even if Congress might without much thought or compunc tion repeal a Statutory provision, nevertheless, the sam Congress would hesitate a long time before overthrowin a Treaty obligation.

No doubt Congress may pass a law breaking down thi Treaty, *pro tanto,* and withdrawing the rights which hav so long obtained under it.

U. S. v. Lim, 176 U. S., 464.
U. S. v. Lee, 185 U. S., 221

But the intent to do so must be *clear* and *unequivocal* The act must not be capable of two interpretations. Th new legislation must clearly and explicitly negative th Treaty right.

Such Treaty provisions will not be held to be repealed in whole or in part, *unless it be perfectly clear that th Treaty provision and the new Statute are repugnant an that both cannot stand.*

Our Supreme Court has repeatedly declared that Treat rights should be regarded as inviolable and not be held t be impaired by subsequent legislation unless the intentio of Congress is perfectly clear.

Chew Heong v. U. S., 112 U. S., 549, 540.
Frost v. Wenie, 157 U. S., 59.
U. S. v. Lim, 176 U. S., 465.
U. S. v. Lee, 185 U. S., 221.
Johnson v. Browne, 205 U. S., 321.

In *Chew Heong v. U. S., supra,* the Court said:

"The Court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such (treaty) stipulations shall be recognized and protected" (page 540).

"For, since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to Congress an intention to disregard the plighted faith of the government, and, consequently, *the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.* The utmost that could be said, in the case supposed, would be, that there was an apparent conflict between the mere words of the statute and the treaty, and that, by implication, the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure. *But, even in the case of statutes, whose repeal or modification involves no question of good faith with the government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act*" (page 549).

In *Frost v. Wenie, supra,* the court said:

"It is well settled that repeals by implication are not to be favored. • • •

No trace can be discovered in the various legislative enactments relating specifically to the Osage trust lands of any intention, upon the part of Congress, to disregard the terms of its treaties with the Osage Indians; and, consequently, the act of December 15, 1880, should not be construed as impairing

the rights of the Indians, *unless such a construction be unavoidable.*"

In *U. S. v. Lee, supra,* the Court said:

"When the two (treaty and statute) relate to the same subject, courts will always endeavor to construe them so as to give effect to both if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control. • • • Nevertheless, the purpose by Statute to abrogate a treaty or any designated part of a treaty or the purpose by treaty to supersede the whole or part of an act of Congress must not be lightly assumed, but must appear clearly and distinctly from the words used."

In *U. S. v. Lim, supra,* the Court said:

"We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution and not violate the provisions of the treaty."

In *Johnson v. Browne, supra,* the court said:

"Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are *absolutely incompatible* and the statute cannot be enforced without antagonizing the treaty. If both can exist, repeal by implication will not be adjudged."

VI.

Forbidding "Through Transit" Not Within the Spirit or Purpose:

THE QUESTION PRESENTED IS, THEN, whether the new act, by virtue of its terms forbidding broadly the importing and transporting of liquors, was intended to and does repeal, as to liquors, the first above quoted statute expressly authorizing trans-shipments through the United States from one foreign country to another, and operates as a repeal or abrogation of Clause 29 of the Treaty as to this subject of commerce.

IT CERTAINLY IS NOT WITHIN THE SPIRIT OR PURPOSE of the act, which is expressly specified in Section 3 above quoted, to be "to the end that the *use* of intoxicating *beverages* may be prevented."

No one will question that this means the use of liquor as a beverage *within the United States,* and that the legislation has no reference whatever to foreign countries or to the use of liquors in foreign countries.

In *United States v. Palmer,* hereinafter quoted, Chief Justice Marshall makes it clear that general words of this character must be limited to cases within the jurisdiction of the Legislative body passing the act. He says:

> "General words must not only be limited *to cases within the jurisdiction of the State,* but also to those objects which the legislature intended to apply them • • •. It would seem that offenses against the United States, not offenses against the human race, were the crimes which the Legislature intended by this law to punish."

Mr. Justice Holmes declares the same rule in *American Banana Co. v. United Fruit Co., 213 U. S., 347.*

Therefore, the purpose of the Eighteenth Amendment and of the act being to prohibit the use as a beverage within the United States, it is plain that the prevention of *SHIPPING THROUGH IN BOND,* duly sealed up and beyond the possibility of being used in the United States, is not within the spirit or purpose of either the Constitution or the Act.

VII.

Not Being Within the Spirit or Purpose of the Act, the Act Will Not be Construed to Include the Case:

Faw v. Marstellar, 2 Cranch., 10.
Taylor v. United States, 207 U. S., 120.
Holy Trinity Church v. United States, 143 U. S. 457, 459.
American Security Co. v. District of Columbia, 224 U. S., 491, 495.
Lau v. United States, 144 U. S., 47, 61.
United States v. Palmer, 3 Wheat., 610.

In *Faw v. Marstellar, supra* (opinion by Chief Justice Marshall), it was very early held by the Supreme Court of the United States that:

> "Where a case is shown to be out of the mischief intended to be guarded against or out of the spirit of the law, the letter of the statute will not be deemed so unequivocal as absolutely to exclude another construction."

In *Taylor v. United States, supra,* the statute forbade the "landing" of aliens in the United States except at certain places designated by immigration officers. This

was held not to prohibit sailors from going ashore while their vessels were in port at other ports and places than those designated by the immigration officials. Such landings were held not to be within the spirit or intent of the act.

In this case Mr. Justice Holmes (at page 125) said:

> "'Landing from such vessel' takes places and is complete the moment the vessel is left and the shore reached. But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. The contrary always has been understood of the earlier acts, in judicial decisions and executive practice. If we reject the ambiguous interpretation of 'to land,' as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American port with a *bona fide* intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert and get in, but there is no evidence that they were doing so in fact."

207 U. S., page 125.

In *Holy Trinity Church v. United States, supra,* the Court said:

> *"IT IS A FAMILIAR RULE THAT A THING MAY BE WITHIN THE LETTER OF THE STATUTE AND YET NOT WITHIN THE STATUTE BECAUSE NOT WITHIN ITS SPIRIT NOR WITHIN THE INTENTION OF ITS MAKERS.* This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results

> which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * * The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed."

The court in this case cites a great many cases and illustrations of the rule to which we respectfully invite attention.

Among other things, Mr. Justice Brewer said:

> "Another guide to the meaning of a statute is found *in the evil which it is designed to remedy*; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body" (page 463).

The concluding language of the opinion is as follows:

> "It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that however broad the language of the statute may be, *the act although within the letter, is not within the intention of the legislature, and, therefore, cannot be within the statute.*"

In *American Security Company v. District of Columbia*, *supra*, the question was whether the Supreme Court of the United States had jurisdiction to review a judgment of the court of appeals of the District of Columbia. Jurisdic-

tion is given by the United States statute in all cases in which "* * * Sixth, in cases in which the construction of *any* law of the United States is drawn in question."

The Supreme Court of the United States held that it would not apply to the *local* laws of the District of Columbia, but only to laws of general application. In deciding the case, Mr. Justice Holmes said:

> "A well-known example of construing a statute not to include a case that indisputably was within its literal meaning, but was believed not to be within the aim of Congress, is *Holy Trinity Church v. United States, 143 U. S., 457.* * * * In the case at bar if the words, 'construction of any law of the United States,' are confined to the construction of laws having general application throughout the United States, the jurisdiction given to this court is confined to what naturally and properly belongs to it."

Again, the court said:

> "Of course, there is no doubt that the special act of Congress was in one sense a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section: 'Cases involving the constitutionality of any law of the United States.' But it needs no authority to show that the same phrase may have different meanings in different connections."

In *Lau v. United States, supra,* a Chinese merchant who had lived in the United States for fifteen years and gone back to China, stayed a period of time, and then upon attempting to return to the United States, failed to get the proper identification certificates from the Chinese Government, and he was excluded by the local officers in San Francisco under the Immigration Act. The general terms of the law plainly forbade his entry, but the Supreme Court of the United States held that he was entitled to enter

under the rule that the statute must be construed *in the light of the evil to be remedied.* Notwithstanding, he was within the letter, his case was not within the spirit. The Court said:

> "But Chinese merchants domiciled in the United States, and in China only for temporary purposes, *animo revertendi,* do not appear to us to occupy the predicament of persons 'who shall be about to come to the United States,' when they start on their return to the country of their residence and business. The general terms used should be limited to those persons to whom Congress manifestly intended to apply them."

In *United States v. Palmer, supra,* the statute to be construed reads:

> "*If any person* shall commit upon the high seas murder or robbery or any other offense which, if committed in the body of a county would by the laws of the United States be punishable by death, etc., such person shall upon conviction thereof suffer death."

Palmer and others were indicted in Massachusetts for piracies committed on the high seas outside the jurisdiction of any county. The question arose, stated by Chief Justice Marshall, as follows:

> "Do the words of the Act authorize the courts of the union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them?
>
> The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But *general words must not only be limited to cases within the jurisdiction of the state,* but also to those objects to which the legislature intended to apply them. * * *

It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish. * * *

But these words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law."

VIII.

he Language of the Constitutional Amendment Throws Strong Light Upon This Question: Not an "Importation into": Not an "Exportation from": Not a "Transportation Within."

The basis of the entire legislation (as shown by title II, ec. 3 of the Act and by the Street and other decisions) s the constitutional amendment and it is not believed that legislative intent to go beyond it or outside of its terms nd spirit will be found by mere implication, even if such ction would be constitutional.

The significant phrases of the constitutional amendment s to this question are:

"The transportation of liquors within" the United States is forbidden.

"The importation thereof into" the United States is forbidden.

"The exportation thereof from" the United States is forbidden.

Not an "Importation Into."

By a narrow interpretation of the words "the importation into the United States," it might be said that the bringing into the United States for trans-shipment through

the United States was an "importation" but, such interpretation is inadmissible under opinions of the Attorney-General in force for many years, and under the decisions.

Years ago it was held by the Attorney-General of the United States, *that to thus bring into the country with intent to immediately export them is not an importation* within the meaning of the law.

In 1909 Attorney-General Wichersham ruled that:

> "The entering of merchandise for immediate export and without any intent that it shall enter into the commerce of the country is not an importation."
>
> *Opinions of Attorney-General, Vol. 27, page 440.*

In M'Lean v. Hager, opium was shipped at Honolulu (then a foreign port) to Panama by way of San Francisco. At San Francisco it had to be transferred to another steamer. It was reported to the Collector at San Francisco as being in transit for Panama, and permit for the transshipment was applied for: The goods were seized by the Collector. It was held not to be an importation. The court said:

> "It was never intended to be brought into the United States for consumption or sale. It was never intended to enter into the commerce of the Country. *It was not imported into the United States in any proper sense of the term.* It was shipped from one foreign port to another by way of San Francisco simply because there was no other convenient means of forwarding it to its destination. It purported on the ship's manifest and in the bill of lading to be shipped from Honolulu to Panama and to be only in transit and it was so reported to the Collector. * * * We cannot attribute to Congress an intention to place so important an obstruction upon the commerce of friendly neighbors—a partial confiscation of the property of their citizens—without a more explicit

expression of such intent than is found in any provision of the Statutes brought to our notice."

M'Lean v. Hager, 31 Fed., 602, 604, 605.

Subsequently, in 1914, Congress passed a special act expressly forbidding the conveyance of opium from one foreign country to another through the United States, or the trans-shipment thereof. 38 Stat. at large, page 276. This is significant when we realize that the "importation" of opium had been previously forbidden (*35 Stat. L., 614*).

Other cases showing that the bringing into the country with intent to immediately convey to another foreign country, is not "an importation," are:

The Conqueror, 166 U. S., page 115.
U. S. v. 85 Head of Cattle, 205 Fed., 679.
The Concord, 9 Cranch., 387.

In *"The Conqueror," supra*, a citizen of the United States purchased in a foreign country a yacht, and in the course of his travels brought her within the waters of the United States. The Customs Collector claimed it was an importation and seized her for duties. The court held otherwise, and among other things said:

"If she be dutiable at all, it must then have been because she was bought by an American citizen. But why should this make her dutiable? She is not imported, or taken into the country in the ordinary sense in which that term is used with reference to other articles—does not become commingled with the general mass of property, and is employed precisely as she might be legally employed by her foreign owners, or by an American citizen leasing her from such owner. Other articles are dutiable, not because they have been purchased, but because they are actually imported and become the subject of sale and commerce within the country."

Not An "Exportation From" the United States.

Like the word "importation," the word "exportation" has a definite, well-understood, legal and commercial signification. It is directly the opposite of "importation."

> *Kidd v. Flagler, 54 Fed., page 369,* and authorities cited.

All of the cases in this subdivision above cited, showing that the receipt of goods from abroad to be carried across the country to another foreign country, is not an "importation," are also direct authorities that the sending out of the same goods is not "an exportation."

The literal meaning of the word "export" may be said to be "to carry out," but in common parlance and legal signification it means something more than that.

It has been defined by our Supreme Court in adopting a definition previously adopted by Attorney-General Brewster.

> *Swan v. U. S., 190 U. S., 143.*
> *17 Op. Attorney-General, 583.*

In Swan v. U. S., supra, it was held that oils purchased in the United States for use upon vessels sailing in the foreign trade, carried on to such vessels and taken from the port of the United States, was not an "exportation." In that case Mr. Justice Brewer said:

> "Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and Laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from

the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.' "

Not a "Transportation Within."

It seems to us that having in mind the intent and purpose of the Constitution and the law, it can justly be said that this practice now under consideration is no more a "transportation within" the United States than it is "an importation into" or "an exportation from" the United States. The common sense construction and the purpose and object of the constitution and the law unite in placing this practice outside the purview of the new legislation.

In United States v. Gudger, the Supreme Court of the United States held:

"The Reed amendment prohibiting transportation of liquor in interstate commerce '*into*' any state which prohibits the manufacture, etc., does not include the movement *through* such state into another state."

In the opinion, Mr. Chief Justice White, said:

"We are of the opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce '*into* any state or territory the laws of which state or territory prohibit the manufacture' includes the movement in interstate commerce *through* such a state to another state."

This is a very plain holding that "*transportation within*" does not necessarily include transportation *through* from one foreign country to another foreign country.

United States v. Gudger, 249 U. S., 373 (May 1919).

A reading of the opinion in the *Gudger case* will satisf that the reasoning is applicable to the case now under di cussion. Virginia prohibited the manufacture or sale intoxicating liquors for beverage purposes. The Ree amendment provided that "whoever shall cause intoxicatin liquors to be *transported* in interstate commerce, excep for scientific, etc., purposes, *into* any state or territory, th laws of which prohibit the manufacture or sale therein intoxicating liquors for beverage purposes, shall be pu ished, etc." The defendant was a passenger from Balt more, Maryland, to Asheville, North Carolina, and whe the train stopped at Lynchburg, Virginia, it was found h had seven quarts of whisky in his valise. He intended g ing on through Virginia to North Carolina. Chief Justic White said:

> "Under this state of facts we think the court wa right in reversing the opinion, as we are of th opinion that there is no ground for holding that th prohibition of the statute (Reed amendment) include the movement in interstate commerce through such state to another. * * *
>
> The suggestion made in the argument that althoug the personal carriage of liquor through one state a a means of carrying it into another, violates th statute, it does not necessarily follow that the trans portation by common carrier through a state for lik purposes would be such a violation, because of th more facile opportunity in the one case than th other of violating the law, is without merit."

The Street Case.

The case of *Street v. Lincoln Safe Deposit Compa* (decided November 8, 1920, reported 254 U. S. 88) is ver illuminative of this case.

The owner of liquor had stored the same in a stora warehouse and intended the same for his own personal a

mily use. The only part of the Statute giving him any ght to possess it, reads: (Title II, Section 33) "But it all not be unlawful to possess liquors in one's private velling while the same is occupied and used by him as s dwelling only, and such liquor need not be reported ovided such liquors are for use only for the personal nsumption of the owner thereof and his family residing such dwelling and of his bona fide guests when enter- ined by him therein; and the burden of proof shall be on the possessor in any action concerning the same to ove that such liquor was legally acquired, possessed and sed."

It was *held* he not only had a right to possess it when his private dwelling but when he had it in his compart- ent in a public warehouse; and also it was held that e had a right to *transport* it from the warehouse to his ivate dwelling, although on the face of the statute all ansportation was forbidden.

The case goes further than the requirements of the case t bar.

It holds that the law was passed to enforce the Eighteenth mendment and must be considered with reference to that rpose, and also that all the provisions must be construed ith respect to the intent of the Constitution and the Statute.

It holds that the possession of the warehouse company such as it was) was not within the purpose of the Act, and hat notwithstanding the general and sweeping clauses gainst any transportation, the right of the individual citizen possess the same in his private dwelling for his private nsumption carried with it the right to have it in a public arehouse and to transport it thence to his home, for his ivate consumption.

A Conclusion.

We submit that the conclusion from the foregoing a judications is just, reasonable and logical, *that this practi is not either "an importation into," an "exportation from or "transportation within" the United States, but is separate and distinct act, a fourth act, recognized by t statutes and in Congressional and departmental proce ings since 1866 as "conveyance in transit" or "transit bond."* (See the history of Sec. 5690 in Vol. 5 U. S. C. 1916, and the debates and opinions referred to in t appendix hereto).

This has been the practical construction adopted by t Government both before and since the adoption of prohi tion; and the Treasury continued to enforce the "trans in bond" treaty and statutes after the Volstead Act we into effect, in accordance with the opinions of the leg departments of the four different governmental branch concerned (Rec., p. 8).

IX.

As to Possession.

But counsel contend (Brief, pp. 21-23), that all "posse sion" is forbidden by Section 3, and hence this practice banned.

But, not so. Under "conveyance in transit" practice, t possession is constructively and actually the possession the United States, through its customs officers and bonded carriers.

All goods are placed in the custody of the governme officials and by them duly sealed, delivered to the bond agents of the United States, carried through the country

those agents to the port of exit, and there delivered to the local U. S. Customs officials, who break the seals, keep control of the goods to the outbound vessels, and release the same, and then certify back to the port of entry the fact of the delivery of the goods to the outgoing ship and its departure from the country.

The practice is exactly the same as when merchandise comes through the port, say, of New York destined for Cincinnati, St. Louis or any other inland port. It is declared at the Custom House in New York, sealed up and delivered to the bonded carrier, forwarded to the final port of destination and there finally delivered by the United States Customs officials to the consignee. This is known as "immediate transportation without appraisement."

The possession is the possession of the United States.

U. S. Comp. Laws 1916, Sections 5698, 5699, 5700, 5695.
Seeberger v. Schweyer, 153 U. S., 612, 613.
Hartranft v. Oliver, 125 U. S., 528, 530.
Harris v. Dennie, 3 Peters, 303-304.

The above statutes and decisions show that the custody and possession of the goods from the time of entry are in the United States officials.

Article 695 of the Treasury Regulations provides, as to goods in transit from one foreign country to another, that:

> "Upon the completion of the entry the same procedure will be followed as in the cases of the entry for immediate transportation without appraisement."

Regulations, Ed. 1915, Art. 695.

X.

Panama Canal Provision:

But it is said:

> "By expressly excepting transportation through the Panama Canal and on Panama Railroad, it is to be assumed that Congress intended that other through transit should be prohibited."

The rule of construction thus referred to, we submit has no application to a case like the present. The exception expressed was not in connection with or a part of the sections now being interpreted.

For, Section 20 relating to the Panama Canal was not part of the original act as introduced or reported, but was a special provision, subsequently inserted, dealing with a special subject requiring separate treatment.

Section 20 was inserted as a Senate Amendment after the House had passed the original bill, and it was thrown in near the end of Title III—not in its proper place at all which would have been in Title II, and was evidently an afterthought, and it was written not by the author of the bill and not in conjunction with the rest of the law.

Title I of the Act covers the further enforcement of "*WAR PROHIBITION*" and consists of seven sections.

Title II is entitled "*PROHIBITION OF INTOXICATING BEVERAGES*" and consists of 39 sections, twelve closely printed pages, and covers practically the whole subject of prohibition after the date fixed for taking effect of the Eighteenth Amendment, which was January 16, 1920.

Title III, is entitled "INDUSTRIAL ALCOHOL" and consists of eleven sections devoted to Industrial alcohol and contains also some miscellaneous sections of a general character included in which is Section 20, relating to the canal zone.

The misplacing of the section and its history show that it was drafted at a different time from the main act, and by different hands, and was intended to cover a subject which was called to attention during the progress of the bill.

It relates only to the Canal zone and touches nothing else. When preparing this the mind of the author of Section 20 would naturally go to the chief business of the canal, namely, *through* business, and when the mind was thus challenged, the committee naturally exempted such *through* traffic because it did not come within the purposes of the act or the constitutional amendment.

On the other hand it is quite evident that the author when preparing the original bill had no thought of the foreign traffic through the United States, perhaps knew nothing about it, as it was insignificant when compared to the general business of the country. Hence, no reference is made to it.

The rule "*expressio unius*" is only an aid to discovering the intent of the author—it is never hard and fast.

U. S. v. Barnes, 222 U. S., 518, 519.
36 Cyc., page 1122.
Dwight v. American Co., 263 Fed., 318.

In *U. S. v. Barnes, supra,* the court said:

> "The position taken by the defendants in error and sustained by the District Court, is that that extension of particular sections is an implied exclusion of all others. *Expressio unius est exclusio*

alterius. We are unable to assent to that positio The maxim invoked expresses a rule of constructio not of substantive law and serves only as an aid discovering the legislative intent when not otherwi manifest."

In Cyc., supra, it is stated:

"The maxim should be applied only as a mea of discovering the legislative intent."

XI.

The Treaty and International Comity:

Conceding that Congress may, notwithstanding the Treat prohibit the carriage through the United States of thing which are legitimate subjects of commerce among our forei neighbors, it will not be lightly so concluded, but only cases where it is clear.

The comity of nations calls for free interchange and e change of accommodations like this, when no harm can com to us, but only profit in the way of freight to our railroad

Only when the construction is inevitable should it be hel that Congress intended to interfere with or regulate th ordinary daily habits or customs of foreign peoples, even to affect them indirectly. Our legislation is directe only to the use of the liquors by our own people and peopl within our territorial limits, and unless the court can s that Congress has plainly prohibited so innocent a prac tice, namely, transportation in bond (one so helpful to ou neighbors), it ought not to be so inferred.

Particularly is this so as to Canada, because there ha long existed the utmost reciprocity and interchange privileges with her. Daily we send hundreds of cars

erchandise of all kinds through various portions of anada from one part of our country to another, ithout hindrance and without duty or tariff. On e other hand her citizens highly value the privileges forded by the Treaty and by this Statute, permitting this ractice to continue. Shall it be held arbitrarily and ithout any good reason whatsoever that certain legisla- n directed to our own affairs solely, was intended thus indirectly strike at our neighbors?

Respectfully submitted,

Alfred Lucking,
Counsel for Appellee.

APPENDIX.

is Treaty Provision is ll in Full Force:

Article XXIX of the Treaty of 1871 has been acted upon in full force down to the present time; but some question was made thirty years ago as to whether Article XXIX was not abrogated at the same time as Articles XVIII to XV inclusive and Article XXX. No attempt was ever ade to abrogate Article XXIX, but it has been argued at by abrogating the others sections, Article XXIX also ll.

Congress by resolution in 1883 gave directions to abrote the "fisheries" sections (viz. 18-25 and 30), but took eat pains both in the House and the Senate to preserve c. 29.

The proceedings show that fact clearly, as is admitted President Harrison in his message. His message was ted February 2, 1893, and he states that the practice d been from 1883 to 1893 to regard Article 29 as in rce, and to act upon it, and the bill of complaint shows at it has been acted upon as being in full force to the esent time. The opinions of such great lawyers as nator Edmunds of Vermont and Secretary of State ward were that Clause 29 was not repealed by the tice of 1883, and a close examination of the treaty clauses d of the legislation will confirm this beyond doubt, we nk, as in brief form, we will now attempt to show.

By the Treaty with Great Britain concluded at Washton on the 8th day of May, 1871, the United States proed for the transit from Canada to certain ports of the ited States, without the payment of duties, of merchan-

dise for export. The material portion of Article XXI
of the Treaty on the subject reads as follows:

> "It is agreed that *for the term of years mentione*
> *in Article XXXIII* of this treaty goods, wares, o
> merchandise arriving at the ports of New York, Bo
> ton, and Portland, and any other ports in the Unite
> States which have been or may from time to tim
> be specially designated by the President of th
> United States, and destined for Her Britannic M
> jesty's possessions in North America, may be entere
> at the proper custom-house and conveyed in transi
> without the payment of duties, through the territo
> of the United States, under such rules, regulation
> and conditions for the protection of the revenue
> the Government of the United States may from tim
> to time prescribe; and under like rules, regulatio
> and conditions goods, wares, or merchandise m
> be conveyed in transit, without the payment of d
> ties, from such possessions through the territo
> of the United States for export from the said po
> of the United States."

The question whether Article XXIX is still in fo
depends upon the meaning of the above words, "the te
of years mentioned in Article XXXIII."

Article XXXIII provides as follows:

> "The foregoing Articles XVIII to XXV, inclusi
> and Article XXX of this treaty, shall take effect
> soon as the laws required to carry them into ope
> tion shall have been passed by the Imperial Parl
> ment of Great Britain, by the parliament of Cana
> and by the legislature of Prince Edwards Island
> the one hand and by the Congress of the Unit
> States on the other. Such assent having been giv
> the said articles shall remain in force for *the peri*
> *of ten years from the date at which they may co*
> *into operation, and, further, until the expiration*

two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterwards."

As will hereafter appear Articles XVIII to XXV, inclu-ve, and Article XXX of the Treaty have been since abro-ated, and the question whether Article XXIX is still in orce depends upon the interpretation to be put upon the hrase *"the term of years mentioned in Article XXXIII"* s used in Article XXIX in fixing the period of its con-nuance in force.

It is argued in some quarters that the phrase "the term f years mentioned in Article XXXIII," indicates not the eriod of ten years and two years' notice mentioned in rticle XXXIII, but that the life of Article XXIX is co-istent only with the life of the Articles mentioned in rticle XXXIII.

The treaty itself nowhere expresses the idea that the o-existence of the fishery provisions and Article XXIX as deemed important, but only that some period of the ration of Article XXIX must be fixed and fixed in the me manner as specified in Article XXXIII for terminating e fishery provisions

On March 1, 1873, Congress passed an act entitled "An t to carry into Effect the Provisions of the Treaty be-een the United States and Great Britain, Signed in the ty of Washington the 8th day of May, 1871, Relating to e Fisheries." The Act consisted of five sections, the first d second of which provided for carrying into effect the ovisions of the Treaty "relating to the Fisheries." The rth section provided for carrying into effect Article XXX the Treaty. Section three of the Act of March 1, 1873, 213 (Sec. 2866 of the Revised Statutes of 1878) provided follows:

"From the date of the President's proclamation declaring that he has evidence that the Imperial Parliament of Great Britain, the Parliament of Canada, and the legislature of Prince Edward's Island have passed laws on their part to give effect to the provisions of the treaty of Washington of May eighth eighteen hundred and seventy-one, as contained in articles eighteen to twenty-five inclusive, and article thirty of said treaty, *and so long as said articles remain in force, according to the terms and conditions of article thirty-third of said treaty,* all goods, wares or merchandise arriving at the ports of New York Boston and Portland, and any other ports in the United States which have been, or may from time to time be, specially designated by the President of the United States and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules regulations, and condition for the protection of the revenue as the Secretary of the Treasury may, from time to time, prescribe; and, under like rules, regulations and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions, through the territory of the United States, for export from the said ports of the United States."

On July 1, 1873, President Grant issued a proclamation referring to the Treaty with Great Britain, and setting forth a Protocol of a conference held at Washington on the 7th day of June, 1873, by which it was mutually agreed between representatives of this country and Great Britain that the laws required "to carry the Articles XVIII to XXV, inclusive, and Article XXX of the Treaty aforesaid into operation, have been passed" by the United States and Great Britain and Canada, and it was mutually declared "that Articles XVIII to XXV, inclusive, and Article XXX * * * will take effect on the first day of July next."

The Resolution of Repeal.

On March 3, 1883, a joint resolution (No. 22, 22 Stat. 641, found in Vol. 1 of the Supplement to the Revised Statutes, 1874-1891, page 422), was passed which provided:

"RESOLVED, etc., That in the judgment of Congress the provisions of articles numbered eighteen to twenty-five inclusive, and of article thirty of the treaty between the United States and Her Britannic Majesty, for an amicable settlement of all causes of difference between the two countries, concluded at Washington on the eighth day of May, anno Domini eighteen hundred and seventy-one, ought to be terminated at the earliest possible time, and be no longer in force; and to this end the President be, and he hereby is, directed to give notice to the Government of Her Britannic Majesty that the provisions of each and every of the articles aforesaid will terminate and be of no force on the expiration of the two years next after the time of giving such notice.

Sec. 2. That the President be, and he hereby is, directed to give and communicate to the Government of Her Britannic Majesty such *notice of such termination* on the first day of July, anno Domini eighteen hundred and eighty-three, or as soon thereafter as may be.

Sec. 3. That on and after the expiration of two years' time required by said treaty, each and every of said articles shall be deemed and held to have expired and be of no force and effect, and that every department of the Government of the United States shall execute the laws of the United States (in the premises), in the same manner and to the same effect as if said articles had never been in force;

And the act of Congress approved March first, anno Domini eighteen hundred and seventy-three, entitled (1) "An act to carry into effect the provisions

of the treaty between the United States and Gre
Britain, signed in the city of Washington the eigh
day of May, eighteen hundred and seventy-one, r
lating to the fisheries," *so far as it relates to th
articles of said treaty so to be terminated* shall b
and stand repealed and be of no force on and aft
the time of the expiration of said two years. (Marc
3, 1833)."

It is thus seen that the Resolution directing repeal o
abrogation *was very carefully limited to the specific sectio
relating to the fisheries.*

It is noteworthy that the joint resolution giving noti
of the termination of certain articles of the treaty, does n
refer to Article XXIX or give any notice of an intent
abrogate that Article. If Congress had desired to abroga
the latter article, it would have been an easy matter
have specifically referred to it at the time, and in vie
of the fact that the point was raised at the time and w
not passed over inadvertently, it is strong evidence of co
temporaneous construction in favor of the continued e
istence of Article XXIX. In fact, in both Senate an
House it was distinctly and unanimously agreed, that Clau
29 would remain unaffected by the action abrogating th
other sections. Such was the unquestioned purpose of bo
Senate and House and the words "so far as it relates to th
articles of said treaty so to be terminated" were inserte
on the floor of the Senate for the express purpose of savi
and preserving Article 29.

This is shown conclusively by the following excerpts fro
the debates.

On the 21st of February, 1883, in the Senate, in discu
sion of the joint resolution, of March 3rd, 1883, which
the Senate was S. R. 123, the Foreign Relations Committe
through Mr. Edmunds an amendment. The following d
bate took place:

Mr. Windom: "I wish to ask the Senator from Vermont (Edmunds) whether Section 3 which repeals 'an act to carry into effect the provisions of the treaty, etc.' will repeal the act under which goods are imported in transit through American territory * * * while the Senator is looking for the Statute I desire to say that I am very unwilling to repeal those clauses of the treaty and those laws which relate to transportation in bond through this country, because it is a very large business and a very great interest would be injured if it should be done."

Mr. Frye: "No notice is given as to Article 29."

Mr. Edmunds: "Oh, no. The only question is whether this repealing clause of the act of 1873 is to operate as repealing the provisions that have been made to carry out article 29; but article 29 did not require any legislation about it: it executed itself. I will look now at the act of 1873 and see if it did provide for carrying out article 29."

Mr. McMillan: "I think the Senator will find it did."

Mr. Edmunds: "It may be but it was not necessary * * *"

To guard against all possible misconstruction about it, I move to amend the amendment of the Committee, page 3, after the end of the description of the title of the act, after 'fisheries' partly in line 13 and partly in line 14, to insert:

'So far as it relates to the articles of said treaty so to be terminated.'

So that we repeal the act only that far."

Mr. McMillan: "I think that covers it."

Mr. Windom: "I am sure it does."

Congressional Record, Vol. 14, part 4, page 3055, Feb. 1st, 1883, 47th Congress, 2nd Session.

And in connection with the same resolution, on page 298, of the same Volume, in the House, February 26th, 883, the following occurred:

Mr. Rice, speaking for the Committee on Foreign Aff
said:

> "We must now give notice by the first of
> July of the abrogation of these clauses of that tr
> and provision is contained in the treaty of t
> clauses and nothing else. * * *
>
> Mr. Washburn: I ask the gentleman from Ma
> chusetts whether the passage of this joint resolu
> will in any way interfere with section 2866 of
> Revised Statutes, which provides for the carryin
> goods in transit through this country?"
>
> Mr. Rice: "Those provisions are excepted f
> the operations of this Resolution in terms in
> Resolution. This applies only to the fisheries."
>
> Mr. Washburn: "If that is the case, I have
> objection to the passage of the bill; otherwise I w
> have objection."

The foregoing abstracts from the Congressional re
show the clear intent of Congress to preserve Art. 2
full force.

The argument on the other side is that bec
Art. 29 states it shall be in force for the term descri
in Art. 33, and because Art. 33 relates only to the Fisher
articles, therefore when the fisheries articles are abrog
by notice, Article 29 would fall also. But this is a u
strained and unnatural construction to place on the langu
in Art. 29, which is devoted to an entirely different subj
The only purpose in thus describing the term in 29 wa
save the repetition of a lengthy sentence defining the t
of duration. It contains 75 words, whereas the single re
ence to it in Sec. 29 calls for only 8 words.

President Cleveland expressed the opinion in his mess
that Section 29 had fallen with the fisheries sections,
withstanding the express intent of Congress to the contr

President Cleveland's message went to Congress un
these circumstances. Extreme irritation had existed

me time between the American and Canadian fishermen, d the President had negotiated a treaty settling these fferences, but the Senate had rejected it. Then President eveland, feeling that our people were unjustly treated Canada and under pressure from our fishermen, on gust 23, 1888, just prior to the Presidential election of t year, in his message to Congress, turned to a policy retaliation against Canada; and he deliberately chose "transit in bond" privilege as the most vulnerable point attack. He pointedly and openly recommended that Con- ess give him the power by legislation to withdraw this ivilege—at the same time recognizing that it would hit th ways. In his message he said that no treaty stood the way because 29 had been repealed in his opinion, but said if Congress differs from me about this, and

> "if in the deliberate judgment of Congress any restraint to the proposed legislation exists, it is to be hoped that the expediency of its early removal will be recognized."
>
> *Messages and Papers of the Presidents, Vol. 8, page 621.*

But Congress refused to grant the request of the Presi- nt. His opinion, given in times of political excitement, as directly contrary to the opinion of his great Secretary State, Thomas F. Bayard, which was delivered under ore calm and serene conditions.

Neither President Cleveland nor President Harrison used eir powers to alter or change the practical construction en in force by both governments, but merely offered their inions on the legal question to Congress, in asking for gislation.

The practical construction to the contrary continued as efore.

The actual contemporaneous construction from 1883 down the present time has been that the treaty is in force.

This was admitted down to 1893 by the Message of Pre
dent Harrison, in language quoted herein—*post*, p. 54.

He further admitted that Congress certainly did not i
tend to abrogate that section, but expressly attempted
preserve it at the time the other sections were being ab
gated. He says:

> "An examination of the debates at the time of t
> passage of this joint resolution (1883) *very clea*
> *shows* that Congress made an attempt to save Arti
> XXIX of the Treaty and Section 3 of the Act
> 1873. In the Senate on the 21st of February, 18
> several Senators, including Mr. Edmunds, Chairm
> of the Judiciary Committee, expressed the opini
> that Article XXIX would not be affected by t
> abrogation of the other articles, and an amendm
> was made to the resolution with a view of leavi
> Section 3 of the Act of 1873 in force. The sa
> view was taken in the debates in the House."

Mr. Harrison finally gives his opinion as follows:

> "*I am inclined to think* that using the aids whi
> the protocol and the nearly contemporaneous legisl
> tion by Congress in the Act of 1873 furnish in co
> struing the treaty, the better opinion is that Artic
> XXIX of the treaty is no longer operative. * *
> But the question whether Article XXIX is in for
> has less practical importance than has been suppose
> for it does not, if in force, place any restraints upo
> the United States as to the method of dealing wit
> imported merchandise destined for the United State
> arriving at a Canadian port for transportation to th
> United States, or of merchandise passing throug
> Canadian territory from one place in the Unite
> States to another."

Secretary Bayard was called upon officially by the Secre
tary of the Treasury to inform the Treasury if Artic

XIX was still in force. In his reply of July 6, 1887, the ecretary of State reviews the treaty and legislative provi-ns and advises the treasury that it is still in full force, th the treaty and also the legislation of March 1, 1873, rrying into effect Section 29. He stated:

> "But it does not appear that Article XXIX * * * was so united with the fisheries articles that neither could stand without the latter. Such was unquestionably the view both of the Senate and the House. * * * The record of the debates of both points shows that the only question raised in either house was whether that part of the resolution which repealed the legislation carrying into effect the articles directed to be terminated would affect the provisions which gave effect to Article XXIX and it was in order to avoid the repeal of these provisions by implication, that the provision of the Act of 1873 should be repealed 'so far as it relates to the Articles of said Treaty to be terminated' was inserted. These words were not in the resolution as originally reported to the Senate but were inserted to meet the objection above stated. You will see also by memorandum accompanying this letter that in the Debates in Congress during the last Session it was generally understood and stated that Article XXIX remained in force."
>
> *Senate Executive Documents, 2nd Session, 52nd Congress, 1892-1893, Volume II, Ex. Doc. No. 40, pages 11, 12.*

In the report of the Senate Committee on Foreign Rela-ions on the proposed new Treaty with Great Britain, lay 7, 1888, the majority reported that the 29th Article f the Treaty of 1871 was in full force. This report was igned by Senators Sherman, Edmunds, Frye, Evarts and Dolph.

The Minority of the Committee at the same time re-orted that Article XXIX was still in full force. This

report was signed by Senators Morgan, Saulsbury, Br
and Payne.

Thus the opinion of that Committee composed of th
great Senators was unanimous.

*Senate Miscellaneous Documents, 1st Session, 5
Congress 1887-1888, Volume 2, Mis. Docket
109.*

Senator Edmunds speaking in the Senate August
1888, referring to the message of President Cleveland
Article XXIX stated that in his judgment the opinion
pressed by Mr. Cleveland that Article XXIX was not
force was "gravely erroneous." That it had been "of
agreed in this body in former discussions of topics t
touched this question" and "was agreed when it pas
the Act directing the President to terminate the ot
Articles named, that Article XXIX was not terminate

Senator Sherman referred to the President's opinion
being based "upon a narrow and technical construction
Article XXXIII."

*House Documents, Volume 132, April 1, 56th C
gress, Second Session, page 332.*

But it is claimed in the brief for the appellants t
Section 3 of the Act of 1873 limited the life of Section
to the life of the other sections as to fisheries, and t
when those sections were abrogated, 29 also fell. But,
Insofar as the Act of Congress of 1873 gave life to Sect
29, it was preserved by the express action of Congress
the resolution of 1883 whereby the repeal was expres
limited to the extent of its operations on Articles 18-25
30.

It is conceded on all hands that Congress intended
limit the repeal of the Act of 1873 to the fisheries sectio
and not to affect Section 29. This was conceded by Pr
dent Cleveland, also by President Harrison, in their m

ges, but it was said that the intention of Congress had iscarried, and that the language of the repeal was not t to effect this intention. We submit this position is holly unwarranted. The intent of Congress is perfectly ain, and that intent should be carried out. The situation exactly the same as if the act or resolution of 1883 had ad:

> "The Act of 1873 is repealed so far as it affects Sections 18-25 and 30, but said act shall remain in full force to give effect to Section 29."

Everybody agrees that this was the plain intent of Con- ess, and will the courts say the legislation should be con- ued directly opposite to the plain intention of Congress?

The most that could possibly be claimed from this state facts would be that Section 3 of the Act of 1873 was pealed, not that Clause 29 of the Treaty was thereby rogated. The treaty itself pointed out the method by ich Clause 29 could be abrogated, namely, by a specific tice from one of the contracting parties to the other, at y time after the ten year period, but not only was this tice never given, but Congress expressly directed the esident to give notice of the abrogation of the fisheries ctions. The treaty, therefore, remained in full force on is subject, and the suitable legislation which has existed tside the Act of 1873, applies to give full force to Section , which is precisely the practical construction which has ways been given to it by the Government of the United ates and the Government of Canada.

The Practical Construction.

Importance of Practical Construction.

We agree with the Government brief in this case (pag 47, 48), that the practical construction by the executive a legislative branches of the Government should have gr weight with this court as to the existence or non-existe of this treaty.

Counsel for the Government, in their brief at page state the proposition as follows:

> "The question being essentially political and judicial, the legislative and executive interpretati should be followed."

The practical construction by our government as well the Canadian government, has been, for the entire fi years, that Clause 29 of the Treaty is in force.

This is expressly stated by President Harrison to be case up to the date of his message which was January 1893 (President Cleveland's message was August 23, 18 In his message President Harrison said:

> "It should be added that the United States continuously, through the Treasury Department, c ducted our trade intercourse with Canada, as if ticle XXIX of the Treaty and Section III of the of 1873 remained in force, and that Canada has c tinued to yield in practice the concessions m by her in that Article. No change in our Treas methods was made, following Mr. Cleveland's m sage from which I have quoted."

Notwithstanding Mr. Cleveland had expressed the opini in 1888 that Clause 29 had been abrogated, neither he President Harrison attempted to abolish or alter the pr tical construction then in force, but that practice contin

st the same as before, both through the United States nd through Canada. It has been continued ever since, o this hour, with the exception of a few days at the time f the seizure of the goods in question.

Immediately following the decision of Judge Tuttle the ld regulations were put in force and they have continued ntil now.

As a matter of fact when the Volstead Act was about o go into effect, the Treasury adopted the necessary regu- tions relative to the transportation of liquors, as permit- d in the Volstead Act, for certain purposes. It is known s Article 16 of Regulations 60 under the National Prohi- ition Act, and Article 16 includes Sections 81 to 93 inclu- ve, covering in detail the general subject of transpor- tion.

Section 93 provides:

> "The provisions of this article do not apply in any respect to the continuous transportation of intoxicating liquors under United States Customs supervision and under bond through the United States from one foreign country to the same or another foreign country."

Thus, the practical construction of the Treasury Depart- ent has been that this practice is not an "importation" r an "exportation," or "transportation within," but it is different and a fourth act recognized as "transit in ond" or a "conveyance in transit" and not within the urview of the National Prohibition Act.

Alfred Lucking,
For Appellee.